



February 16, 2011

Chairman Zinke
Senate Education Committee

SENATE EDUCATION

EXHIBIT NO. 1

DATE 2-16-11

BILL NO. SB 315

Re: Senate Bill 315

Dear Chairman Zinke and Members of the Senate Education Committee:

The Montana School Boards Association strongly supports Senate Bill 315 and appreciates Senator Ripley's introduction of this bill. Senate Bill 315 contains two primary concepts, both of which can stand independent of one another on their own respective merits.

Concept 1: Elected School Boards' decisions should be entitled to the same deference as the decisions of county superintendents, arbitrators and reviewing courts.

The Problem under Current Law:

Senate Bill 315 proposes to change the method by which teacher termination cases are reviewed on appeal. Under current law, once a decision is reached by a board of trustees, the community is divested of local control and the matter is determined by either an arbitrator who is often from out of state or regionally by the county superintendent. Regardless of who is conducting the review, it is conducted "de novo" with a completely new hearing without any required regard for the decision made by the board of trustees.

Ironically, once the appellate decision is made, *that* decision is provided all of the deference Senate Bill 315 proposes for school board decisions. In fact, in the case of arbitration decisions, there are even stronger protections in the law protecting the decision of the arbitrator.

So, decisions of county superintendents, arbitrators, the state superintendent of public instruction and the board of public education are all entitled to deference by any reviewing court, while the decisions of elected school board members may be completely disregarded on appeal.

How Would SB 315 Improve This Situation?

Senate Bill 315 would provide decisions of elected school board members with the same deference and protection on appeal already provided to decisions of county superintendents, arbitrators, the state superintendent of public instruction and the board of public education, nothing more and nothing less.

Under Senate Bill 315, the process of review would be streamlined and made comparable to the standard of review applicable under the Montana Administrative Procedures Act (MAPA) that is used to review the decisions of state agencies, including the review of decisions made by the Superintendent of Public Instruction and the Board of Public Education with regard to denial, suspension or revocation of a teacher's license.

The fact is, MAPA is used to regulate and determine the rights of Montanans in a wide variety of matters under current law, including professional and occupational licensure, determination of wage and other employment-related matters, and resolution of discrimination claims. The standard set forth in Section 1 of Senate Bill 315 is pulled directly from nearly identical language in 2-4-704 of MAPA.

Montana School Boards Association

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2-4-704. Standards of review. (1) *The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.*

(2) *The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:*

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

(3) *If a petition for review is filed challenging a licensing or permitting decision made pursuant to Title 75 or Title 82 on the grounds of unconstitutionality, as provided in subsection (2)(a)(i), the petitioner shall first establish the unconstitutionality of the underlying statute.*

So, if MAPA provides sufficient due process to a teacher facing not just the loss of his or her job but of his or her license to engage in the profession itself, that same standard should be sufficient for due process in cases of teacher termination.

You may hear opponents claim that this turns the elected board of trustees into a “judge, jury and executioner” in teacher termination cases, but nothing could be further from the truth. As you can see from Section 1 of Senate Bill 315, the decision of an elected board of trustees may be overturned on 7 separate grounds, each of which are the same grounds upon which any other agency’s decision may be overturned under MAPA. There are more than adequate safeguards in place to ensure that an arbitrary decision of a board of trustees will not stand.

Concept 2: Teachers should be entitled to the same job protections, no more and no less, than the rest of Montana workers.

The Problem under Current Law:

Under current law, a tenure teacher may be terminated for “good cause”. We believe that the term “good cause” under current law, though undefined in Title 20, is the same as under the Wrongful Discharge Act where that term is defined. Current Montana law regarding statutory construction supports our argument in this regard:

1-2-107. Applicability of definitions. *Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.*

Unfortunately, however, because the meaning of good cause under the teacher termination statutes does not specifically reference the Wrongful Discharge Act, school districts and teacher unions have been left to argue and re-argue this issue perpetually before arbitrators with a different result virtually every time the

issue is raised. We have seen arbitrators apply a good cause standard from the Wrongful Discharge Act, while others have applied "just cause" or "just and reasonable cause" or hybrids of the foregoing and even other variations. And because arbitration decisions are not binding precedence, school boards and teachers are left to repeat the argument regarding what standard applies to termination every time the issue arises with no binding precedent to guide them in resolving this issue.

How Would SB 315 Improve This Situation?

Senate Bill 315 would improve the current law by clearly linking the term "good cause" in the teacher termination statutes to the term as it is used in the Wrongful Discharge Act:

39-2-903(5) "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

Senate Bill 315 would improve the consistency of employment terminations by providing tenure teachers with the same protection against wrongful termination that is currently enjoyed by every other Montana worker under the Wrongful Discharge Act. This in turn will help school boards and teachers in determining what kind of conduct is sufficiently egregious to justify termination. There is a wealth of binding caselaw on this subject based on years of decisions of the Montana Supreme Court. By incorporating the statutory standard and binding precedence under the Wrongful Discharge Act, Senate Bill 315 will bring consistency to teacher termination decisions and appeals thereof.

Are There Further Amendments to SB 315 That Could Further Improve Tenure Teacher Termination Procedures?

We believe that a further amendment to SB 315 could improve the bill even further over its introduced version, by specifically referencing the remedies available to a wrongful discharge under the Wrongful Discharge Act.

Under current law, an arbitrator may order the reinstatement of a teacher. We have seen a number of cases where the arbitrator has found that a teacher engaged in the alleged conduct but determined that the termination decision of the board of trustees was too harsh a penalty. Following the statutory procedure set forth in 20-4-204(9), these arbitrators have ordered reinstatement, placing everyone in an impossible position. The district is typically not willing to take such a teacher back even if the teacher is willing to accept reinstatement and these matters are typically resolved through a separate settlement providing for some level of compensation in return for an agreement to waive the right to reinstatement. We believe that Senate Bill 315 could be further improved by incorporating the same remedies available under the Wrongful Discharge Act. The following amendment to 20-4-204(9) would accomplish these ends:

20-4-204(9) An arbitrator, county superintendent or reviewing court may order a school district to reinstate award a teacher who has been terminated without good cause, as defined in 39-2-903, any of the damages referenced in the remedies afforded a wrongfully-terminated employee under 39-2-905, subject to the limitations therein and in 2-9-105, MCA, and to provide compensation, with interest, to a teacher for lost wages and fringe benefits from the date of termination to the date that the teacher is offered reinstatement to the same or a comparable position. Interim earnings, including the amount that the teacher could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, reasonable amounts spent by a teacher in searching for,

~~obtaining, or relocating to new employment must be deducted from interim earnings.~~

~~(10) Except as provided in this section, an arbitrator may not order a school district to provide compensation for punitive damages, pain and suffering, emotional distress, compensatory damages, attorney fees, or any other form of damages.~~

You may hear from opponents that there was some sort of perpetual deal struck on the teacher tenure laws back in 1997. That argument should hold no weight, as there has been over a decade of experience under that law that has shown the flaws that were incorporated into the changes in 1997. MTSBA and its members have worked hard to make things work under the current law on tenure without making any attempt to change such law since the late 1990's. After over a decade plus of experience, however, we believe it is time for some improvements in the law.

We have seen local communities repeatedly divested of their right to enforce community standards for decency and interactions between adults and children and have been left with a number of decisions where an out of state arbitrator has come in, found that a teacher engaged in misconduct as determined by the elected board of trustees, but determined, contrary to the decision of the elected board of trustees, that such misconduct was not sufficiently egregious to justify termination. Elected school boards are left in the aftermath of such decisions with the obligation to reinstate the teacher, typically with an arbitrator endorsed "slap on the hand" and then convince the local community that their children can be adequately protected from a teacher ordered to be reinstated by an arbitrator who does not have to answer to the local community and who does not have to live with the consequences of his or her decision.

I hope that the above information is helpful to the Committee as it deliberates on Senate Bill 315 and we respectfully urge your passage of this important bill.

Sincerely,



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Executive Director
Montana School Boards Association